83-1326

Office - Supreme Court, U.S.
FILED
DEC 13 1983
ALEXANDER L. STEVAS,
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

TERM, 19

UNITED STATES OF AMERICA,
Respondent, Appellee

vs.

JAY C. WISSLER,
Petitioner, Appellant

ON APPEAL FROM THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR CERTIORARI

Jeffrey J. Valocchi, Esq.
342 E. Lancaster Avenue
Downingtown, PA. 19335
(215) 269-0900

QUESTION PRESENTED

Did the District Court err in refusing to grant a mistrial (or grant defendant's post-trial motion for a new trial) based on the prosecutor's inflammatory remarks made during his closing argument, thereby denying petitioner his right to due process?

IN THE SUPREME COURT OF THE UNITED STATES

TERM, 19

UNITED STATES OF AMERICA,
Appellee

vs.

JAY C. WISSLER,
Appellant

PETITION FOR CERTIORARI - CRIMINAL CASE

TABLE OF CONTENTS

	Page
Question Presented	(i)
Caption	(ii)
Table of Contents	(iii)
Table of Authorities	(iv)
Opinions Below	1.
Jurisdictional Statement	1.
Constitutional Provisions and Statutes Involved	1.
Statement of the Case	4.
Existence of Jurisdiction Below	7.
Conclusion	16.
Appendix - Exhibit A	17.
Appendix - Exhibit B	25.
Appendix - Exhibit C	26.

TABLE OF AUTHORITIES

Table of Cases	Page
Berger v. United States, 295 U.S. 78 (1935)	8.
United States of America v. Jay C. Wissler, 716 F2d 1050 (1983)	4., 5.
Statutes and Rules	
21 U.S.C. Section 846	2.
Constitutional Provisions	
Fifth Amendment, United States Constitution	1.

OPINIONS BELOW

The opinion of the Court of Appeals below (Appendix "A", infra, p. 17) is reported in 716 F2d 1050. The opinion of the District Court below (Appendix " ", infra, p. 25) was not reported.

JURISDICTION

The judgment of the Court below (Appendix "B", infra, p. 17) was entered on September 6, 1983. Rehearing was denied on October 13, 1983 (Appendix "C", infra, p. 26). The jurisdiction of this Court is invoked under 28 U.C.S. Section 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. The Fifth Amendment of the United States Constitution, which provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or

indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

2. The statute under which petitioner was prosecuted, though nothing turns on its terms, was 21 U.S.C. Section 846, Conspiracy to Distribute Cocaine, which provides:

> Any person who attempts or conspires to commit any offense

defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

STATEMENT OF THE CASE

A. COURSE OF PROCEEDINGS IN THE FIFTH AMENDMENT NOW BEFORE THIS COURT.

On October 31, 1981, in a cause then pending in the United States District Court for the District of Maryland, entitled United States of America v. Jay C. Wissler, Criminal Number 82-5087, tried together with co-defendant Naylor Harrison in United States of America v. Naylor Harrison, Jr., Criminal Number 82-5031(L), petitioner was found guilty by a jury on an indictment of one count charging a violation of 21 U.S.C. §846, Conspiracy to Distribute Cocaine. On December 14, 1981, the District Court entered judgment and petitioner was sentenced to five years imprisonment with all but six months of his sentence suspended. Petitioner also received a four and one half year probationary term with the condition that he attend a drug program. This judgment and sentence was affirmed by the Court of Appeals

for the Fourth Circuit, United States of America v. Jay C. Wissler, Number 82-5082, 716 F2d 1050 (1983), and a petition for rehearing was denied on October 13, 1983. Petitioner is presently serving his sentence.

B. RELEVANT FACTS CONCERNING THE UNDERLYING CONVICTION AND THE ALLEGATIONS CONCERNING THE FIFTH AMENDMENT CLAIM.

During petitioner's trial in the District Court, the prosecutor in his closing argument to the jury, made highly inflammatory, improper, and prejudicial remarks. These comments were immediately objected to by counsel for petitioner, and a motion for mistrial was made. This motion was denied, and the prosecutor continued with his closing statement. There were no specific instructions by the Court to the jury to disregard the statements or any other specific precautionary instructions. A motion for new trial based on these remarks was also denied. Although the District Court found the statements to be improper, the Court concluded that they constituted harmless

error.

The Court of Appeals also conceded the impropriety of the remarks, but held they did not rise to the level that would require a new trial. The Court of Appeals found the case against petitioner to be strong and found no undue prejudice to the petitioner.

EXISTENCE OF JURISDICTION BELOW

Petitioner was convicted in the District Court for the District of Maryland of one count under 21 U.S.C. Section 846.

The Court of Appeals has decided a federal question in a way which conflicts with applicable decisions interpreting the Constitution of the United States.

This case involves the petitioner's right to a fair trial and his denial of due process in a criminal trial.

During the trial in the District Court the prosecutor made the following comment in his closing to the jury:

> "And let me -- maybe the first thing I should do is let you know where I stand. I would never in a million years say I love that man or that man. I hate them both and I hate their kind and what they're doing to our society."

These comments were unquestionably improper. They constituted an expression of his own personal opinion and were intended to raise issues which were not in evidence in the case.

The prosecutor attempted to raise the issue of illicit drugs in society where the only issue in the case was whether or not petitioner conspired to distribute cocaine. The remarks were prejudicial and inflammatory in nature, highly improper, and constitute prosecutorial misconduct. In Berger v. United States, 295 U.S. 78, ff S.Ct. 629 (1935) the Court set forth the following standard of conduct for a United States Attorney: "He may prosecute with earnestness and vigor - indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones." The United States Attorney is assigned the duty of protecting the impartiality of the jury, not arousing their passions. In this case, it is clear the prosecutor acted improperly in his remarks to the jury and that the remarks

were highly prejudicial resulting in the denial of petitioner's constitutional right to a fair trial.

This misconduct is of particular importance when viewed in light of the weakness of the case which was presented against petitioner. The evidence against Wissler on the charge of conspiracy to distribute consisted of testimony from two government witnesses, tape recordings of three telephone conversations, and records of telephone calls made to the defendant. One of the government's witnesses admitted that Wissler's knowledge of cocaine was not extensive. The other witness was testifying pursuant to a plea agreement. Much of this testimony was vague and ambiguous, making the credibility of the witnesses a significant issue. There was no strong, specific or direct evidence to show any intent on the part of Wissler to join in a conspiracy to distribute cocaine and there was absolutely no direct evidence to show an intent on his part to distribute cocaine.

Giving the prosecution the benefit of many doubts, the evidence is, at most, consistent only with personal use and not supportive of any intent to distribute. A close reading of the record in its entirety leads to this conclusion and by no stretch of the imagination can it be said that the government's case against Wissler on the charge of conspiracy to distribute and possession with intent to distribute was "strong."

The prejudice, caused by the prosecutor's remarks, combined with the weakness of the case against petitioner, clearly shows that the petitioner's right to a fair trial has here been denied; the only way to remedy that denial is the granting of a new trial.

In such cases involving prosecutorial misconduct, the Court considers four factors as follows: whether the prosecutor's comments were invited or in response to defense counsel's statement to the jury; whether the prosecutor's

Giving the prosecution the benefit of many doubts, the evidence is, at most, consistent only with personal use and not supportive of any intent to distribute. A close reading of the record in its entirety leads to this conclusion and by no stretch of the imagination can it be said that the government's case against Wissler on the charge of conspiracy to distribute and possession with intent to distribute was "strong."

The prejudice, caused by the prosecutor's remarks, combined with the weakness of the case against petitioner, clearly shows that the petitioner's right to a fair trial has here been denied; the only way to remedy that denial is the granting of a new trial.

In such cases involving prosecutorial misconduct, the Court considers four factors as follows: whether the prosecutor's comments were invited or in response to defense counsel's statement to the jury; whether the prosecutor's

statements were purposeful and flagrant; whether the comments were isolated or brief; and whether or not sufficient curative instructions were given by the Court.

THE PROSECUTOR'S REMARKS WERE NOT PROPERLY MADE IN RESPONSE TO DEFENSE COUNSEL'S STATEMENTS.

In the case at bar, the prosecutor argues that his remarks were in response to defense counsel's closing statement. It must be noted that the prosecutor's comments were meant to appeal to the fear of illicit drugs and drug dealers. This issue, which heretofore had not been introduced into the trial, had a very prejudicial effect and had a tendency to mislead the jury.

The defense comment which the prosecutor contended invited his response was that "... I (defense counsel) have to argue for a boy I have come to love ...". It is significant to note that no objection was made by the prosecutor following this comment. The proper

remedy here was for the prosecutor to object; his failure to do so at the proper time did not open the door to his outrageous conduct.

The rebuttal remarks by the prosecutor were so severely prejudicial, and were the result of highly unprofessional and improper conduct that it is inconceivable that the remarks of defense counsel could have invited such a response. The totality of the prosecutor's remarks were, in no way, shape or manner, permissibly responsive to defense counsel's closing.

THE PROSECUTOR'S STATEMENTS WERE PURPOSEFUL AND FLAGRANT.

There can be little doubt that the prosecutor intended the impact of his remarks. Such a direct appeal to the emotions, fears, and prejudices of the jury cannot be unintended. The invocation of the image of a dope dealer or peddler is an innately prejudicial trial tactic. The prosecutor

continued with this line of argument when he stated:

> "Maybe that man doesn't even use cocaine, that's quite possible, but he's willing to pray upon the weakness of others, ..."

This statement was objected to as improper. When viewed together with the previous comments by the prosecutor, it is clear he was pursuing a purposeful direction in his closing argument; he clearly intended his argument to appeal to the passions and emotions of the jury.

THE PROSECUTOR'S ARGUMENTS WERE NOT ISOLATED OR BRIEF.

The comments made by the prosecutor were made at the end of a long and heated trial. The trial was marked by various indiscretions on the part of the prosecutor. One such example occurred when, in response to certain defense testimony, the prosecutor objected and stated that "... I will go with the agents (sic) word

any day of the week." Once again, the prosecutor voiced his own opinion as to the credibility of a witness in a highly improper manner. It is of particular importance to note that following the comment the jury was not instructed to disregard it, nor was it striken.

The improper comments by the prosecutor in this trial were not isolated; the prosecutor made it evident throughout the trial what his personal views were. Taken separately the comments of the prospecutor were improper; when viewed in total, they operated to deny petitioner of his right to a fair trial.

THE DISTRICT COURT DID NOT ISSUE SUFFICIENT CURATIVE INSTRUCTIONS.

Following the prosecutor's remarks during closing, the Court did not strike the comments or issue sufficient curative instructions to the jury to remedy the prejudicial impact of the statements. The Court's only admonishment was to state that:

"I will instruct the jury that

argument is argument. Now both of you have gotten way out of line and I've let you get out of line and I shouldn't have done it, the whole group of you."

On objection of defense counsel to further improper remarks by the prosecutor, the Court rebuked counsel stating that "I object to your getting up again. I will instruct, counsel, in reference to argument. He didn't interrupt you except once and you've interrupted him three times now so that's twice more, so leave him alone." This can hardly be considered adequate immediate curative instruction; rather, it inured to the benefit of the prosecutor's continued improper remarks and further prejudiced the defendant.

When comments are so grossly improper, as in this case, and adequate curative instruction is not given, the only remedy is the granting of a new trial.

CONCLUSION

When the remarks of the prosecutor are so grossly improper and serve to arouse the passions and prejudice of the jury, coupled with a weak case against a criminal defendant, the only effective way to protect petitioner's right to a fair trial is to grant a new trial. This is particularly true in light of the fact that the remarks of the prosecutor were uncalled for, calculated, consistent, and highly prejudicial. No proper curative instructions were given although it is far from clear whether any such instructions could have negated the undue and unfair prejudicial effect of such comments. Petitioner has been denied his very basic constitutional right to a fair trial. The last opportunity he has to regain that right is through this Honorable Court's granting the within petition for certiorari.

Respectfully submitted,

VALOCCHI & FISCHER

Jeffrey J. Valocchi, Esq.
Counsel for Petitioner

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 82-5031

United States of America, Appellee
vs.
Naylor R. Harrison, Jr., Appellant.

No. 82-5087

United States of America, Appellee
vs.
Jay C. Wissler, Appellant.

Appeal from the United States District Court for the District of Maryland, at Baltimore. Edward S. Northrop, Senior District Judge.

Argued: June 10, 1983

Decided: September 6, 1983

Before HALL, SPOUSE, and ERVIN. Circuit Judges.

Charles G. Bernstein (Andrew D. Levy, Frank, Bernstein, Conaway & Goldman on brief) for Appellant Harrison; Jeffrey J. Valocchi (Valocchi & Fischer on brief) for Appellant Wissler; Price O. Gielen, Assistant United States Attorney (J. Frederick Motz, United States Attorney on brief) for Appellee.

SPROUSE, Circuit Judge:

After a joint jury trial in the United States District Court for the District of Maryland, Naylor R. Harrison, Jr., and Jay C. Wissler were convicted of conspiracy to distribute cocaine, in violation of 21 U.S.C. Section 846. Harrison was individually convicted of three additional counts of knowingly or intentionally distributing cocaine, in violation of 21 U.S.C. Section 841(a)(1). Both men appeal their convictions, assigning nine errors in the conduct of the trial below, including among others (1) improper denial of jury instructions; (2) prosecutorial misconduct; (3) failure to set aside the verdict for insufficient evidence; and (4) refusal to allow separate trials. None of the appellant's contentions has sufficient merit to warrant discussion except their argument concerning prosecutorial misconduct.

Harrison and Wissler's trial lasted four days, during which there were several instances of improper colloquy involving the Assistant

United States Attorney and Wissler's defense counsel. At one point the verbal exchanges became so heated the trial court sternly admonished both sides: "I will instruct the jury that argument is argument. Now both of you have gotten way out of line and ' I've let you get out of line and I shouldn't have done it, the whole group of you." This admonishment was prompted by the prosecutor's rebuttal argument in which he said:

> Now the first thing I want to talk about is the law of conspiracy because it was grossly, grossly misrepresented to you. And let me -- maybe the first thing I should do is let you know where I stand. I would never in a million years say I love that man or that man. I hate them both and I hate their kind and what they're doing to our society.

The appellants' strenuously contest the propriety of these comments, and argue that their prejudicial effect upon the jury can only be cured by a new trial.

The prosecutor's comments clearly were improper and he should have been rebuked not only by the trial judge. but by his superior, the United States Attorney. The government had expended considerable resources in presenting

convinging evidence of Harrison and Wissler's guilt, but the prosecutor's senseless conduct jeopardized these otherwise solid cases. The more serious, although perhaps less tangible, consequences of these unfortunate comments are the basic image of unfairness they project and the inevitable stain they place on our trial system. The prosecutor, as much as any other officer in the judicial process, has an obligation to safeguard the right to trial by an impartial jury. See Berger v. United States, 295 U.S. 78, 85, 88; 55 S.Ct. 629, 79 L.Ed. 1314 (1935). There are narrowly defined circumstances, however, where even egregious remarks will not necessarily require reversal of a conviction. This case presents such circumstances. The prosecutor's concededly improper comments were invited by the equally egregious conduct of Wissler's defense counsel. While not excusing the prosecutorial misconduct, this factor, together with the trial court's admonitions and other circumstances of the trial, saves an otherwise well-prosecuted case from reversal.

Whether improper argument by government counsel has so prejudiced the trial process as to require reversal must be gauged from the facts of each trial. See Miller v. State of North Carolina, 583 F.2d 701, 706 (4th Cir. 1978). Like others, this court has employed various tests in making this determination, depending on the requirements of the particular case. In United States v. Elmore, 423, F.2d 775 (4th Cir.)., cert. denied, 500 U.S. 825 (1970), for example, we were most concerned with whether the remarks were "pronounced and persistent, with a probable cumulative effect upon the jury which cannot be disregarded as inconsequential." id. at 781, quoting Berger v. United States, 295 U.S. 78, 89 (1935). In United States v. Callanan, 450 F.2d 145, 151 (4th Cir. 1971), we identified the relevant considerations as: "Whether the untoward remarks prejudiced (the defendant) must be tested by the 'closeness of the case, the centrality of the issue affected by the error, and the steps taken to mitigate the effects of the error'." In Miller v. State of North Carolina,

583 F.2d 701 (4th Cir. 1978), this court suggested that the content of the prosecutor's comments and their calculated effects on the jury's decision always should be considered in deciding whether a new trial is necessitated. In United States v. Karas, 624 F.2d 500 (4th Cir. 1980), cert. denied, 449 U.S. 1078 (1981) we looked to the factos announced in United States v. Leon, 534 F.2d 667 (6th Cir. 1976) in determining whether the prosecutor's remarks constituted reversible error.

The court in Leon identified four factors which are central to determing whether improper prosecutorial comment is so damaging to the defendant's trial as to require reversal: (1) the degree to which the prosecutor's remarks have a tendency to mislead the jury and to prejudice the accused; (2) whether the remarks were isolated or extensive; (3) absent the remarks, the strength of competent proof introduced to establish the guilt of the accused; and (4) whether the comments were deliberately placed before the jury to divert attention to extraneous matters. 534 F.2d at

679. These factors best embody all the considerations we deemed relevant in earlier cases. and they will be applied here.

There is no questions the evidence against both Wissler and Harrison was strong. The government produced five witnesses who described various drug transactions involving either or both of the defendants. Their testimony was corroborated by telephone and hotel records, placing Harrison and Wissler at specified locations during the relevant time frame. The government also introduced tape-recorded conversations between the defendants and a key witness in the prosecution's case. Portions of those recordings contained highly incriminating statements concerning the whereabouts and value of an unrecovered package of cocaine. In light of this formidable evidence. the government's case did not, as the appellants contend, revolve solely around the credibility of its witness. Nor does it appear that the prosecutor's outburst enhanced already sound cases.

It is equally clear the prosecutor's comments were not deliberately placed before the

jury in a manner calculated to evoke personal prejudice against the defendants. See, e.g., Miller v. State of North Carolina, 583 F.2d 701 (4th Cir. 1978). Rather, his comments were provoked if not invited by defense counsel for Wissler. At one stage of his closing argument, for example, defense counsel expressed bewilderment that "a representative of ... my government, (would) twist testimony and tell you something false on the chart that he put in front of you." He prefaced this attack on the prosecutor with an emotional expression of "love" for the defendant Wissler. At another juncture in closing argument, Wissler's defense counsel dismissed an apparently well-founded objection as "another good prosecutorial trick" to interrupt the presentation of the defendant's case. Later. Wissler's defense counsel again repeated the "twist testimony" charge and strongly intimated the prosecutor was guilty of complicity in a key witness' allegedly false testimony. Finally, Wissler's defense counsel concluded his argument in a highly-emotional

state, relating to the jury his client's personal pleas made to him only moments before in a private meeting. The prosecutor's offensive remarks were made against this backdrop of improper defense argument.

Any statement of personal belief jeopardizes the integrity of the trial process. This is doubly true when the statement is case in prejudicial and emotional terms, like the prosecutor's comments here. Courts generally recognize, however. that statements of personal belief, while error, do not constitute reversible error if they are invited or provoked by opposing counsel. See, e.g., U.S. v. Mouton, 617, F.2d 1379, 1385 (9th Cir.) cert. denied, 439 U.S. 868 (1980); United States v. Cooper, 577 F.2d 1079 1086 (6th Cir.), cert. denied, 439 U.S. 868 (1978); Del Cristo v. United States, 327 F.2d 208, 209 (5th Cir. 1964) (per curiam); Henderson v. United States, 218 F.2d 14 (6th Cir. 1955). "The closing argument of the prosecutor must be considered in the light of the previous arguments of defense counsel in order to determine whether there was provocation for what the prosecutor said."

United States v. Hoffa, 349 F.2d 20, 50 (6th Cir. 1965), aff'd, 385 U.S. 293 (1966). Whether from the heat of battle or tactical purpose, Wissler's defense counsel's closing argument in the instant case was riddled with provocation.

The conduct of both prosecutor and defense counsel could have seriously damaged the trial process. The trial judge, however, contained any prejudice which may have flowed from the remarks by promptly admonishing both sides and by later offering curative instructions before the case went to the jury. See Elmore 423 F.2d at 781, 782. This intervention by the trial judge, combined with the fact that the prosecutor's comments were not used to bolster his case, but instead were provoked by defense counsel's vitriolic attack, leads us to the conclusion that the defendants' trial was not "so fundamentally unfair as to deny (them)due process."[1] Donnelly v. De Christoforo, 416

---

[1] We recognize that, in cases of prosecutorial misconduct, the due process clause should not always be the touch-stone of whether reversal is appropriate. This court has inherent supervisory

U.S. 637, 645, 94 S.CT. 1868, 40 L.Ed. 2d 431 (1974).

Accordingly, the appellant's convictions are affirmed.

AFFIRMED

---

power to hold government prosecutors to a higher standard of conduct then required by the due process clause when necessary to ensure the fair administration of justice and to safeguard judicial integrity. See., e.g., United States v. Payner, 447 U.S. 727 (1980). The exercise of this power, however, is most appropriate "in particular fact situations that do not lend themselves to rules of general application." United States v. Gonsalves, 691 F.2d 1310, 1316 (9th Cir. 1982). In the case sub judice, we do not feel it necessary to invoke our supervisory powers to reach a result not required either

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

UNITED STATES OF AMERICA	:	
	:	
vs.	:	CRIMINAL ACTION
	:	
NAYLOR R. HARRISON, JR. and JAY C. WISSLER	:	NO. N-81-0378

ORDER

Upon motions of defendant Jay C. Wissler in arrest of judgment and for a new trial, and motion of defendant Naylor R. Harrison, Jr. for a new trial, and the opposition of the Government thereon, on December 14, 1981, and having rendered an oral opinion, IT IS, this 5th day of February, 1982, ORDERED as follows:

1. That the motions of defendant Jay C. Wissler in arrest of judgment and for a new trial BE, and they hereby ARE, DENIED nunc pro tunc as of December 14, 1981.

2. That the motion of defendant Naylor R. Harrison, Jr. for a new trial, BE, and the same hereby IS, DENIED nunc pro tunc as of December 14, 1981.

3. That the Clerk of Court shall mail/deliver copies of this Order to counsel of

record for the parties to this action.

/s/
Edward S. Northrop
United States District Judge

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

NO. 82-5087

UNITED STATES OF AMERICA,

Appellee

versus

JAY C. WISSLER,

Appellant.

ORDER

Upon consideration of the appellant's petition for rehearing, by counsel,

IT IS ORDERED that the petition for rehearing is DENIED.

Enetered at the direction of Judge Sprouse for a panel consisting of Judge Hall, Judge Sprouse and Judge Ervin.

FOR THE COURT,

/s/ William K. Slate, II

Clerk